a way is binding upon singular successors, and we may therefore look upon the contract of 1777 as if it had been made between the parties to this case. Your Lordship has already explained the nature of that contract,—it was one of mutual concession, and equal value was given by each party. In the contract a servitude *altius non tollendi* was established in favour of Mr Walker over the cellar built behind Messrs Banks' house. I agree with your Lordship that there is in the contract no restriction as to the use to which this building is to be put, so far as consistent with giving effect to the servitude *altius non tollendi*. But the building must not be heightened, and if the proprietor cannot have a fire in the building without violating that condition, then that is a use to which they cannot put the building. I cannot see the distinction between raising the building by a chimney and raising it in any other way. If, in order to have a practically effective chimney it was necessary to have it the full size of this small building, could it be contended that it would not be a violation of this servitude to raise such a chimney to the height of four storeys? Where there is a servitude not to raise a building, the obligation is not to raise any part of it, and chimneys are included in such a servitude as well as anything else. I do not see anything in this contract to show that the restriction does not include a chimney. This building was a cellar of small size, not a dwelling-house, and not capable of being made one, and the agreement was that this cellar was not to be raised higher. I fail to see how raising a chimney on part of the building is not a violation of that agreement, just as much as raising the whole structure would be.

It is said that Mr Walker has no interest to maintain this right. I think he has. There are already buildings behind his house obstructing the light and air, this proposed chimney would do so still further, so I think that Mr Walker has a clear right to insist upon this servitude being maintained.

LORDS ARDMILLAN and JERVISWOODE concurred with the Lord President.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Dean of Guild complained of: Find that the chimney proposed to be erected by the respondents is not inconsistent with the right of servitude constituted in favour of the appellant by the contract of 30th January 1777; therefore remit to the Dean of Guild of new to repel the appellant's pleas, and grant the warrant prayed for by the respondents (petitioners)," &c.

Counse for Petitioners—Dean of Faculty (Clark), Q.C., and Marshall. Agent—W. Saunders, S.S.C.

Counsel for Respondent—Solicitor-General (Millar), and Duncan. Agent—Party.

Friday, June 5.

FIRST DIVISION.

[Lord Mure, Ordinary.

RITCHIE *v.* ROSS AND OTHERS.

Husband and Wife—Trust Settlement—Divorce—Provisions to Wife.

A husband by an irrevocable and delivered trust-disposition and settlement provided an annuity for his wife (from whom he was living separate on account of her intemperate habits) in case of his death. Six weeks afterwards he brought an action of divorce on the ground of adultery against his wife, and obtained final decree. *Held* that by this decree the said annuity was forfeited.

This action was brought by Mrs Christian Mary Carmichael or Ritchie against Sir David Ross and others, the trustees and executors nominate of the deceased George Ritchie of Hill of Ruthven, in the following circumstances.

The pursuer was married to Mr Ritchie in 1852, and about 1868 they were separated on account of the intemperate habits of the pursuer. In 1870 the pursuer brought an action of adherence and aliment against her husband, which was compromised, and on 22d November 1871 Mr Ritchie brought an action of divorce on the ground of adultery against the pursuer. In this action of divorce the Lord Ordinary granted decree on 28th February 1872, and the pursuer reclaimed. Mr Ritchie died on 27th June 1872. On 27th May 1874 the First Division adhered to the interlocutor of the Lord Ordinary granting the divorce, the trustees of Mr Ritchie having been sisted as respondents in the reclaiming note.

On 6th October 1871 Mr Ritchie had executed a trust-disposition and settlement in favour of Sir David Ross and others, the defenders, to whom he disponed his heritable and part of his moveable property for the purposes therein set forth. The third purpose of the deed was as follows:—"Thirdly, in respect that I have agreed to pay and will myself continue to pay during my life to Mrs Christian Mary Carmichael or Ritchie, my wife, so long as we live separately as at present, the sum of two hundred pounds sterling yearly, ... and I wish the same to the extent aftermentioned to be continued to her after my death so long as she survives me. I direct and appoint my said trustees after my death, from the dividends of the stocks hereinafter assigned and conveyed to them, to pay to the said Mrs Christian Mary Carmichael or Ritchie an annuity of one hundred and fifty pounds sterling, ... and I further direct my said trustees to allow her the sum of thirty pounds sterling for mournings on the occasion of my death; and further, as it is my wish that the said Mrs Christian Mary Carmichael or Ritchie shall not return to the Hill of Ruthven after my death, I hereby direct my trustees not to permit her to reside there, and to take all steps necessary to secure this; which annuity in favour of my said wife shall be in lieu of all terce of lands, legal share of moveables, and everything that she *jure relictæ* or otherwise could ask, claim, or crave of me, my heirs, executors, or representatives through my death in case she shall survive me. And which annuity I consider to be an ample aliment for her in her position and habits of life, and that a larger income would not be for her advantage, and which provision in favour of my said wife is hereby declared to be purely alimentary, and not to be assigned by her or attachable by her creditors."

The said deed was rendered on 24th October 1871. Mr Ritchie had also, on 26th October 1871, executed a testament disposing of the rest of his moveable property, on the narrative that by the trust disposition he had already divested himself

of all right to or control over his heritable and part of his moveable property.

In these circumstances, Mrs Ritchie brought the present action, which concluded for payment of £30 for mournings, and an annuity of £150 in terms of Mr Ritchie's trust disposition and settlement, or for payment of £5000 due to her as widow of the said George Ritchie.

The pursuer pleaded—In virtue of the deceased George Ritchie's trust disposition, or otherwise in respect of her *jus relictae*, the pursuer is entitled to decree in terms of the conclusions of the summons.

The defenders pleaded—The action is excluded by the decree of divorce obtained by the late Geerge Ritchie against the pursuer, and the defenders should therefore be assoilzied, with expenses.

The Lord Ordinary, in respect of the decree of divorce, dismissed the action.

The pursuer appealed and argued—The trust settlement of 7th October 1871 was an irrevocable deed and not of the nature of a marriage contract or a deed *propter nuptias*. The deed, or at least that part of it containing provisions for the pursuer, was rather in the position of an irrevocable donation from the husband to the wife *stanti matrimonio*. Such a provision was not touched by the decree of divorce.

Argued for the defender—The provisions in the deed were given to the pursuer as the wife of the granter—there was nothing to shew that when the deed was executed Mr Ritchie knew of his wife's adultery or contemplated a divorce. Nothing was more clearly settled than that a wife divorced for adultery loses all her provisions, just as if she were dead. The provisions in this trust deed were made for the pursuer in the character of Mr Ritchie's wife, and therefore came under that principle. The fact that the deed was irrevocable made no difference.

Authorities—Stair, i. 4, 20; Ersk. i. 6, 46; *Turnbull* v. *Tawse*, April 15, 1825, 1 W. & S. 80; *Smelton* v. *Tod*, Dec. 12, 1839, 2 D. 125; *Napier* v. *Orr*, 18th Nov. 1864, 3 Macph. 57; *Thomson* v. *Dick*, 10th Feb. 1854, 16 D. 529; *Harvey* v. *Farquhar*, Feb. 22, 1872, 10 Macph. H. L. 26; *Beattie* v. *Johnston*, Feb. 5, 1867, 5 Macph. 340 and 6 Macph. 333; *Dunlop's Trustees* v. *Dunlop*, Mar. 24, 1865, 3 Macph. 758; *Innerwick*, March 1589, M. 529; *Thom* v. *Thom*, June 11, 1852, 14 D. 861.

At advising—

Lord President—This is an action at the instance of Mrs Ritchie, wife of the late Mr George Ritchie, concluding for payment of an annuity of £150 settled upon her by her late husband by a trust-deed *inter vivos*, executed by him before his death; or alternatively, for payment of £5000, or such other sum as she may be found legally entitled to as widow of her said husband. The defence is, that the pursuer is divorced, and has therefore forfeited all her rights, conventional or legal.

The circumstances of the case are peculiar. Mr and Mrs Ritchie were married so far back as 1852, but as it turned out that the habits of Mrs Ritchie were not of the best, a separation occurred—although at what precise date does not appear. In March 1870, however, Mrs Ritchie raised an action of adherence and aliment, and an arrangement was come to by which Mr Ritchie agreed to pay her an annuity of £300 so long as she remained separate from him. This arrangement received the sanction of Lord Gifford, before whom the case depended.

After this, Mr Ritchie executed two deeds. First, upon 6th October 1871, he conveyed the bulk of his estate to trustees by an irrevocable deed, which was delivered. Afterwards, on the 26th of the same month, Mr Ritchie made a will which seems to have simply disponed such moveable property as had not been included in the former deed. This latter deed, however, does not bear on the present question.

On 22d November 1871 Mr Ritchie raised an action of divorce on the ground of adultery against his wife, and upon 28th February 1872 obtained decree of divorce from the Lord Ordinary. That judgment was reclaimed against by the wife, but before the reclaiming-note was heard the husband died, and the case was dropped from the roll. Last March, however, the trustees of Mr Ritchie were sisted as respondents in the reclaiming note, and on 27th May we adhered to the judgment of the Lord Ordinary.

These are the circumstances in which Mrs Ritchie claims the provisions in her favour contained in the deed of 1871. At that date she was Mr Ritchie's wife, and the annuity was settled upon her as his wife. The terms of the third purpose of the deed are—[*His Lordship then read the third purpose of the trust-deed, quoted above*].

Now, it is impossible to read that provision without seeing that the settlement was upon Mr Ritchie's wife as his wife, and in fulfilment of his legal and moral obligations to provide for his widow after his death.

The rule of law is clear, that when a woman is divorced for adultery she cannot claim any provision which is made for her as a wife, or in the prospect of viduity. The wife divorced for adultery is in the eye of the law in the same position as if she were dead. If she were so she could not claim this annuity, so the rule of law seems directly applicable to this case.

It is unnecessary to add that the legal provisions claimed alternatively in the summons are in the same position.

Lord Deas—I agree with the view taken by your Lordship.

It is quite clear, in the third place, that the pursuer has no right to the sums contained in the alternative conclusions of the summons.

As to the annuity of £150, it is equally clear that she cannot claim that unless it appears that Mr Ritchie meant her to have that provision notwithstanding any decree of divorce which he might obtain. But in the trust-deed it is impossible to find any indication of such intention. Mr Ritchie may have intended his wife to have the provision even after divorce, but there is nothing in the deed to lead to such an inference, and the deed is all we have to go upon.

Lord Ardmillan and Lord Jerviswoode concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the pursuer Mrs Christina Mary Carmichael or Ritchie, against Lord

Mure's interlocutor dated 22d October 1873, Recal the said interlocutor; sustain the defences; assoilzie the defenders, and decern."

Counsel for the Pursuer—C. Smith, A. J. Young. Agent—Thomas Lawson, S.S.C.

Counsel for the Defenders—Fraser. Agent—John Galletly, S.S.C.

Friday, June 5.

FIRST DIVISION.

[Lord Gifford, Ordinary.

MARION AITKEN BROCK *v.* ROBERT WILLIAM RANKINE.

Lawburrows—Malice and Want of Probable Cause—Suspension—Oath.

In a case of suspension of a charge on letters of lawburrows, *held* (1) that in the face of the suspender's own letters a proof of malice and want of probable cause on the part of the charger was useless; (2) that the fact that, at the time of taking out the letters of lawburrows the suspender was undergoing a nearly expired sentence of imprisonment was no reason for allowing a proof of want of probable cause; (3) that the administration of the oath by a messenger at arms was according to law and common form.

The complainer Brock having used violent and repeated threats against the respondent, he applied for and obtained letters of law-burrows against her, and as she failed to find caution to keep the peace she was incarcerated for a considerable time. She accordingly presented a note of suspension and liberation.

The Lord Ordinary pronounced the following interlocutor.

"*Edinburgh*, 10*th February* 1874.—The Lord Ordinary having heard parties' procurators, and having considered the Closed Record, writs produced, minutes, and whole process, repels the reasons of suspension: Finds the charge orderly proceeded, and decerns: Finds, in respect that the suspender has found caution in terms of the interlocutor of the Lord Ordinary, dated 7th December 1872, affirmed by the First Division by interlocutor dated 21st December 1872, and has thereupon been liberated, farther procedure in this action is unnecessary, and decerns: Finds the suspender liable in expenses, and remits the account thereof when lodged to the Auditor of Court to tax the same and to report.

"*Note.*—This case has been most anxiously argued on both sides, and raises questions of very great importance; for if the suspender's pleas are well founded, the practice in relation to letters of law-burrows, which has been observed admittedly for upwards of two centuries, is illegal, and must now be discontinued.

"A great deal was urged in argument as to the extremely anomalous nature of the procedure under letters of law-burrows. It was maintained that the whole procedure was unconstitutional—that it involved a violation of the most sacred rights of personal liberty; and it was said that the Court was bound to discourage and repress the practice by applying with malignant and vindictive severity the strictest rules regarding formalities, and to avail itself of the slightest defect in the most trifling particular to quash the diligence altogether.

"It is certainly true that the procedure under letters of law-burrows, however well suited to the habits and manners of the fifteenth century, is not well adapted to those of the present day, and would certainly not be introduced in modern legislation. But so long as the old statutes and the old forms of procedure are not in desuetude, it is the duty of the Court to give effect thereto. It is the province of the Legislature and not of the Court to make alterations or changes in the existing law, and no considerations of supposed expediency will justify a judge or a Court in refusing to administer an existing law while it remains unrepealed or unaltered.

"Now it was fairly and candidly admitted by the counsel for the suspender that the old law regarding letters of law-burrows is not in desuetude. Indeed it may be said to be *in viridi observantia*, for many letters of law-burrows pass the Signet and are carried out every year and almost every month, and the reports of judicial decisions contain many instances of the procedure being recognised and sustained.

"Nor does it appear to the Lord Ordinary that the suspender takes much benefit by asking that strict rules shall be applied to the diligence or procedure. In all diligence formalities must be strictly observed, and it was not disputed by the respondent, that if he can be shewn to have omitted or neglected any usual or necessary solemnity, the diligence must be suspended and set aside.

"After carefully considering the whole objections stated by the suspender, the Lord Ordinary is of opinion that none of these objections are well founded, and he has therefore repelled the whole reasons of suspension, and found the charge orderly proceeded.

"The suspender's objections fall naturally under two classes, which must be separately dealt with. *First*, There are objections in point of form which arise *ex facie* upon the simple inspection of the letters of law-burrows, and of the executions and other recorded procedure following thereon, and then there are—*Second*, What may be called extrinsic objections which do not appear on the face of the procedure, but depend upon the statements or averments of the suspender. The Lord Ordinary will very shortly notice both classes of objections in their order, and it may be convenient to follow generally the order taken in the suspender's pleas in law.

"(1) It was not seriously disputed that letters of law-burrows issuing under the Signet are still competent, and that the letters of law-burrows in the present case were taken out and passed the Signet in the usual way. No doubt the procedure was commented upon as anomalous, and even unconstitutional, but it was not disputed that such letters are in themselves legal. Indeed, it could not be maintained in the face of existing practice, and in the face of numerous recorded decisions, that letters of law-burrows have been abolished.

"The suspender's counsel maintained that in point of principle no person should be deprived of personal liberty without the express and direct warrant of a judge, and he seemed inclined to maintain that in every case it was necessary that the mind of the judge himself should be applied